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Nos. 94-890 and 94-907

In the Supreme Court of the United States

OCTOBER TERM, 1994

NATIONAL RAILWAY LABOR CONFERENCE, PETITIONER

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.

BURLINGTON NORTHERN RAILWAY COMPANY, PETITIONER

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL MEDIATION BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Mediation Board's railroad merger procedures were subject to judicial review.

2. If so, whether the court of appeals erred in holding that certain provisions in the merger procedures violated the Railway Labor Act.

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OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a-52a)[1] is reported at 29 F.3d 655. The vacated panel opinion (Pet. App. 54a-80a) is reported at 988 F.2d 133.

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[1] "Pet. App." refers to the appendix filed with the petition in No. 94-890.

The decision of the district court in No. 94-890 (Pet. App. 81a-87a) is unreported. The order of the district court in No. 94-907 (Pet. App. 103a-106a) is unreported. The decision of the National Mediation Board under review in No. 94-907 (Pet. App. 107a-130a) is reported at 18 N.M.B. 240.

JURISDICTION

The judgment of the court of appeals following rehearing en banc was entered on July 19, 1994. On October 11 and October 12, 1994, the Chief Justice issued orders extending the time for filing petitions for writs of certiorari to and including November 16, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The primary purpose of the Railway Labor Act (the Act), 45 U.S.C. 151 *et seq.*, is to facilitate the resolution of labor-management disputes in the rail and air transportation industries, and thereby to "avoid[] * * * industrial strife, by conference between the authorized representatives of employer and employee." *Virginian Ry.* v. *System Fed'n No. 40*, 300 U.S. 515, 547 (1937); see 45 U.S.C. 151a. To that end, the Act requires that carriers, their employees, and unions "exert every reasonable effort to make and maintain agreements * * * and to settle all disputes * * * in order to avoid any interruption to commerce or to the operation of any carrier." 45 U.S.C. 152 First.

Under the Act, employees are guaranteed "the right to organize and bargain collectively through representatives of their own choosing," 45 U.S.C. 152 Fourth, the majority of any "craft or class of employees" who work for a particular carrier have the right to select a single

representative to serve as their exclusive bargaining agent, *ibid.*; 45 U.S.C. 152 Second; *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 749 (1961), and the carrier must negotiate, or "treat," with that representative to settle labor disputes, 45 U.S.C. 152 First and Ninth; *Virginian Ry.*, 300 U.S. at 548.

Section 2 Ninth, of the Act (45 U.S.C. 152 Ninth) plays a further and critical role in the statutory scheme by "set[ting] up the machinery" for selecting and certifying employee representatives, *Brotherhood of Ry. & S.S. Clerks* v. *Association for the Benefit of Non-Contract Employees* (*Railway Clerks*), 380 U.S. 650, 658 (1965), and by providing a mechanism for the resolution of disputes among the employees of a craft or class regarding the identity of their bargaining representative: Upon the request of any party to such a dispute, the National Mediation Board is obligated to conduct an investigation, and to determine and certify to both parties to the dispute, and to the carrier, the identity of the employees' representative.[2] The legal and

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[2] Section 2 Ninth provides in relevant part as follows:

> If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the * * * Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties * * * the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carriers. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. * * * The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be

factual determinations made by the Board in its resolution of such a representation dispute are, as a rule, not subject to judicial review. *Switchmen's Union* v. *National Mediation Bd.*, 320 U.S. 297, 300 (1943). Board actions are reviewable, however, if taken "in excess of its delegated powers and contrary to a *specific prohibition in the Act.*" *Railway Clerks*, 380 U.S. at 660 (quoting *Leedom* v. *Kyne*, 358 U.S. 184, 188 (1958)); see also *International Bhd. of Teamsters* v. *Brotherhood of Ry., Airline & S.S. Clerks*, 402 F.2d 196, 205 (D.C. Cir.) (review of Board action available in "instances of constitutional dimension or gross violation of the statute"), cert. denied, 393 U.S. 848 (1968).

2. This case arose from the Board's attempt to address unique representational problems created by the merger of carriers in the airline and railroad industries. Because the employees of each carrier have their own bargaining representatives, when two or more carriers merge it will often be unclear who represents the crafts and classes of the resulting entity. It could be the representative of the employees who had worked on the surviving carrier's lines, or it could be the representative of the employees who had worked on the non-surviving carrier's lines. Often each representative asserts that it retains its certification with respect to the employees that work on its previously distinct lines. The confusion that arises regarding the identity of the authorized representative, as well as the accretion of multiple representations, poses significant practical problems that can frustrate the negotiation of collective bargaining agreements and hinder day-to-day labor-

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deemed necessary by it to carry out the purposes and provisions of this paragraph.

45 U.S.C. 152 Ninth.

management relationships. See Pet. App. 91a-95a, 121a-122a.

The Board first addressed the representation problems that attend carrier mergers in the context of the airline industry, but its analysis was equally applicable to, and reflected the Board's substantial experience with, railroad mergers. In *Republic Airlines & Hughes Air Corp.*, 8 N.M.B. 49 (1980), the Board noted that railroad mergers had produced "uneven representation, duplication of effort, and confusion," and had "significantly reduced the ability of railroads to integrate operations and manage a single rail system." *Id.* at 54-55. In light of those difficulties, and the "inherent inefficiency" in maintaining multiple carrier systems solely for representation purposes, the Board held that the representation certifications on the acquired airline, Hughes Air Corporation, were extinguished "by operation of law" upon Hughes's acquisition by Republic Airlines. *Id.* at 56.

In practice, however, the *Republic Airlines* approach did not sufficiently stabilize labor relations, and it posed difficulties for employees and unions. See *TWA/Ozark Airlines*, 14 N.M.B. 218 (1987). Concluding that automatic extinguishment of certifications was "inadequate to provide for a fair and orderly resolution of representation matters put into flux by a merger," *id.* at 241, the Board promulgated interim procedures under which airline carriers involved in a merger, acquisition, or consolidation were permitted to petition the Board to determine the post-merger status of any certifications previously issued by the Board. Carriers were directed to provide notice to the Board of an impending merger at the time they applied to the Department of Transportation for permission to merge, or as soon as possible thereafter. *Id.* at 242-243. Those interim procedures

were later adopted on a permanent basis. See *Procedures for Handling Representation Issues Resulting from Mergers, Acquisitions or Consolidations in the Airline Industry*, 14 N.M.B. 388 (1987).

In 1989, the Board proposed for the railroad industry merger procedures resembling those that it had adopted for the airline industry. Following a comment period, the Board issued its *Procedures for Handling Representation Issues Resulting from Mergers, Acquisitions or Consolidations in the Railroad Industry*, 17 N.M.B. 44 (1989) (Merger Procedures) (reproduced at Pet. App. 90a-102a). The Board explained that prompt resolution of representation disputes connected with railroad mergers was necessary to effectuate the Board's "statutory mandate to certify only unions that represent the majority of a system-wide class of employees." *Id.* at 92a. Under the Merger Procedures, carriers are required to notify the Board of expected mergers, whereupon the Board undertakes to determine whether the merged carriers would operate as a single transportation system, and then to determine the status of outstanding certifications on the merged carrier. Pet. App. 96a, 99a. Incumbent unions on the affected carriers may comment concerning the carrier's submissions and other pertinent matters. *Id.* at 100a. The incumbent unions may also avail themselves of a simplified procedure for applying to represent employees on the full system. *Id.* at 97a-98a.

3. On December 8, 1989, the non-federal respondents filed suit against the Board in the United States District Court for the District of Columbia, seeking declaratory and injunctive relief concerning the Merger Procedures. C.A. App. 9. The complaint in that action (No. 94-890) alleged that the Merger Procedures violated the Railway Labor Act, 45 U.S.C. 152 Ninth, and the

Administrative Procedure Act (APA), 5 U.S.C. 551, 553, because they permit persons other than employees or their representatives to invoke the services of the Board.[3] Petitioners, the National Railway Labor Conference and Burlington Northern Railroad Company (Burlington Northern), intervened as defendants.

The district court dismissed the challenge to the Merger Procedures for lack of jurisdiction, on the ground that neither the "face of the pleadings" nor a "peek at the merits" disclosed an error of constitutional dimension or a "gross violation" of the Railway Labor Act. Pet. App. 84a-85a (quoting *International Ass'n of Machinists* v. *TWA*, 839 F.2d 809, 811, amended, 848 F.2d 232 (D.C. Cir.), cert. denied, 488 U.S. 820 (1988), and *Professional Cabin Crew Ass'n* v. *National Mediation Bd.*, 872 F.2d 456, 459 (D.C. Cir.), cert. denied, 493 U.S. 974 (1989)). The court found that Section 2 Ninth of the Act does not "impose a clear and mandatory duty on the Board to refrain from investigating in the wake of a carrier's request." Pet. App. 86a. The court noted in that respect that the Act does not state that the Board may determine and certify collective bargaining representatives *only* if an employee or representative requests its intervention. *Ibid.*

4. On June 14, 1989, Burlington Northern filed a petition with the Board requesting the Board to resolve several representation disputes that had resulted from the mergers between 1970 and 1985 of several railroads into Burlington Northern. C.A. App. 70. The petition

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[3] The complaint also alleged that the Merger Procedures violated the Board's own procedures, see 29 C.F.R. Pt. 1203, as well as the Due Process Clause of the Fifth Amendment. The district court rejected those claims, Pet. App. 81a, 86a n.3, and respondents did not appeal the dismissal of those claims.

alleged that although Burlington Northern operated as a single transportation system, "labor organizations representing employees who work under collective bargaining agreements have attempted to maintain a fragmented representational scheme and promoted minority representation." *Id.* at 73.

The Board's investigation revealed that the merger of 11 railroads into Burlington Northern had resulted in the existence of 85 certifications with respect to railroads that no longer existed. Pet. App. 109a. After determining that it had jurisdiction to entertain Burlington Northern's application, *id.* at 116a-120a, the Board found that a single transportation system existed on the Burlington Northern for purposes of the Railway Labor Act. *Id.* at 122a. Applying its "longstanding practice * * * to certify only unions that represent the majority of a system-wide craft or class of employees," *id.* at 123a, the Board extinguished all certifications on the predecessor railroads, effective as of the date of its decision, *id.* at 123a-124a. The Board then determined which unions represented the system-wide crafts or classes on the Burlington Northern. Pet. App. 124a-129a.

On May 16, 1991, the non-federal respondents brought an action in the United States District Court for the District of Columbia, challenging the Board's *Burlington Northern* decision. On September 12, 1991, the district court granted the Board's motion to dismiss that case (at issue in Burlington Northern's petition in No. 94-907) on the same grounds expressed in its earlier opinion rejecting respondents' facial challenge to the Merger Procedures. Pet. App. 105a.

5. The district court decisions were consolidated and reversed on appeal. Pet. App. 54a-80a. The Board sought and was granted rehearing en banc, but after rebriefing

and reargument, the court again reversed, in a 5-4 decision. *Id.* at 1a-52a, 53a. The court concluded that the Merger Procedures were subject to judicial review under *Leedom* v. *Kyne*, *supra*, because the Procedures constituted a "gross violation" of the Railway Labor Act. Pet. App. 10a. In the court's view, the nonreviewability rule of *Switchmen's Union* was designed only to protect the Board in the exercise of its circumscribed role under Section 2 Ninth—to investigate and resolve certification disputes brought to its attention by employees—and outside those confines the nonreviewability rule has no application at all. Pet. App. 7a-12a. The court also adopted the view taken by Judge Randolph (in a concurrence joined by all members of the majority) that the APA permits, and *Switchmen's Union* does not proscribe, judicial review of the Board's actions when the Board acts through APA-type rulemaking procedures. *Id.* at 4a n.1, 31a-34a.

Turning to the merits, the court of appeals found no support in the text of Section 2 Ninth for the Board's asserted authority to investigate and resolve representation issues in the absence of an employee request. Pet. App. 16a-21a. The court rejected the "suggestion that [the Board] possesses *plenary* authority to act within a given area simply because Congress has endowed it with *some* authority to act in that area," noting that "[a]gencies owe their capacity to act to the delegation of authority, either express or implied, from the legislature." *Id.* at 28a-29a. The court found, in addition, that the legislative history and prior Board interpretations of the Act cut against the Board's position that it may resolve representation issues in the absence of a request by employees or their representatives. *Id.* at 21a-28a. The court then remanded respondents' challenge to the Merger Procedures for entry of

declaratory and injunctive relief, and remanded respondents' challenge to the Board's *Burlington Northern* decision for reconsideration in light of the court's analysis of the Merger Procedures. *Id.* at 30a.

Judge Williams, joined by three other judges in dissent, disagreed both with the majority's application of the nonreviewability doctrine and with the majority's view that the Board's initiation of certification procedures under the Merger Procedures exceeded the Board's statutory authority. See Pet. App. 35a-52a. Judge Williams saw in *Switchmen's Union* no basis for distinguishing between the Board's resolution of a particular representational dispute—which is not subject to judicial review—and the Board's determination of what disputes it is authorized to resolve—which, under the majority's analysis, is subject to review. *Id.* at 40a-42a. He also saw no justification in *Switchmen's Union* for distinguishing for purposes of reviewability between the Board's exercise of authority in an adjudication and its promulgation of rules of general application. In Judge Williams' view, such a distinction, made by the concurrence (and adopted by the majority), will merely dispose the Board against the use of notice-and-comment rulemaking procedures. *Id.* at 36a-39a. On the merits, the dissent found nothing in the text, history or underlying purposes of the Railway Labor Act to preclude the Board from undertaking to resolve certification issues in circumstances other than those (*i.e.*, upon the request of an employee or employee representative) in which the Board is affirmatively required by Section 2 Ninth to act. *Id.* at 45a-52a.

ARGUMENT

1. To the extent that the court of appeals relied on *Leedom* v. *Kyne*, *supra*, in determining that it had

jurisdiction to review the validity of the Merger Procedures, the mode of analysis it employed is consistent with this Court's teaching. The court of appeals acknowledged the highly deferential standard of review accorded decisions of the Board, and it recognized that Board actions can be reviewed and reversed only in the most extraordinary of circumstances. See Pet. App. 10a (acknowledging that "[j]udicial review of [Board] decisions is one of the narrowest known to the law," and that "'courts have no authority to review [Board] certification decisions in the absence of . . . a gross violation of the Railway Labor Act'").[4] Although the Board does not agree with the court's conclusion that provisions in the Merger Procedures that permit the Board to initiate a representation investigation violate the Act—grossly or otherwise—that disagreement does not warrant this Court's review. We have been informed by the Board that it is considering alternative ways to address the representational problems that arise from carrier mergers and consolidations.

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[4] The court of appeals stated that this case did not involve a review of the merits of a particular certification decision, but involves instead an analysis of the threshold question whether the Board "ha[d] * * * jurisdiction to act at all." Pet. App. 10a. Although the court noted that some other courts of appeals have held that questions respecting the Board's authority to act fall categorically outside of *Switchmen's Union*'s proscription against review, *id.* at 13a, the court recognized that "it may not always be a simple task to distinguish between Board actions which implicate the Board's threshold jurisdiction and those which are simply an erroneous exercise of functions legitimately entrusted to the Board's discretion," *id.* at 14a. The court found no need to resolve whether jurisdictional questions invariably merit a different standard of review, however, because it concluded that the Board's action in this case was reviewable even under the restrictive standard employed in *Leedom* v. *Kyne*, *supra*. Pet. App. 15a.

Moreover, the basis of petitioners' legal argument in this Court is that although Section 2 Ninth of the Act imposes a duty on the Board to resolve a representational dispute when requested to do so by one of the employees (or employee representatives) who is a party to the dispute, it does not preclude the Board from addressing representational issues in other circumstances if the Board elects to do so. 94-890 Pet. 19-21; 94-907 Pet. 27-28. Petitioners do not argue that the Act confers on them a right, which the court of appeals has now abrogated, to have the Board address representational issues in the merger context in the absence of a request to do so by an employee or employee representative who is involved in a dispute.

2. The court of appeals also endorsed the concurrence's view that *Switchmen's Union* does not apply when the Board acts through APA-like rulemaking procedures. Although the Board believes, for the reasons stated by the dissent, that *Switchmen's Union* applies irrespective of whether the Board acts through rulemaking or adjudication, the decision below is of limited applicability because the Board rarely acts through formal rulemaking processes.

It is significant, in that respect, that the court of appeals ruled definitively only with respect to respondents' facial challenge to the Merger Procedures. The court did not overturn the Board's *Burlington Northern* decision (at issue in No. 94-907), in which the Board actually adjudicated a representational dispute in accordance with the Merger Procedures; instead, the court remanded respondents' challenge to that decision to the district court for further consideration. It is unclear how, under the court of appeals' analysis, the district court is expected to rule on respondents' challenge to the Board's application of the Merger

Procedures in the context of representational issues involving a particular carrier. Until the district court rules on the matter, issues respecting the Board's *application* of the Merger Procedures will not be presented clearly for review.

3. Finally, there are no conflicts among the courts of appeals on any of the issues presented by these cases. Neither the railroad Merger Procedures nor the airline merger procedures have been facially challenged in any other circuit. Contrary to petitioners' assertions (94-890 Pet. 17-18; 94-907 Pet. 23-25), the Sixth Circuit's decision in *Brotherhood of Maintenance of Way Employees* v. *Grand Trunk Western R.R.*, 961 F.2d 1245 (1992), does not conflict with the decision below. To the contrary, the Sixth Circuit relied upon District of Columbia Circuit precedent in concluding that judicial review of National Mediation Board decisions is quite limited. See 961 F.2d at 1249. And although *Grand Trunk Western Railroad* also involved an application of the Merger Procedures, the parties in that case did not contest, and the court did not consider, the Board's authority to act to resolve a representational dispute when the Board's jurisdiction has not been invoked by an employee or an employee representative who is a party to the dispute—the key question on the merits in this case.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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